Freedom of Association: *NAACP v. Alabama?*

The principal focus of this Comment is the use of privileges to protect information from discovery in the course of a lawsuit. The protection afforded by the first amendment to organizations and members of organizations appeared with clarity in the 1958 United States Supreme Court decision of *NAACP v. Alabama* ex rel. *Patterson.*[1] Whenever freedom of association is at issue this case as well as its progeny must be considered. Thus, this Comment first sets out a brief background of the theory of privilege, examines *NAACP* and its two major holdings, and then attempts to come to terms with the meaning of *NAACP* to the Court.

I. PRIVILEGES IN GENERAL

Professor Wigmore's discussion of the duty to testify is a good backdrop to an understanding of privilege. According to Wigmore "there is a general duty to give what testimony one is capable of giving and . . . any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."[2] By virtue of being a member of society one has a duty to give testimony in any causes of action of which one may have knowledge. Our duty to assist others in the maintenance of their rights "necessarily flows from the relations we bear each other as members of the same community, we being mutually dependent upon each other for security and protection."[3] Just as our *duty* to testify is founded on our relation with the community as a whole, the community as a whole also has a *right* to the testimony. The demand for our testimony comes from the "community as a whole—from justice as an institution and from law and order as indispensable elements of civilized life."[4] Wigmore finds the rationale for the duty to testify in the very fabric of a civilized society; justice suffers neglect in every refusal to recognize the

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1. 357 U.S. 449 (1958).

2. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE]. Wigmore quotes Jeremy Bentham on the extent of the general right that one member of the public has to the testimony of another:

> Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves,—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary,—they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.

Bentham, *Draught for the Organization of Judicial Establishments*, in 4 THE WORKS OF JEREMY BENTHAM 320 (Bowring ed. 1843), *quoted in* 8 WIGMORE, *supra*, § 2192 at 71.

3. Bennett v. Waller, 23 Ill. 97, 179 (1859), *quoted in* 8 WIGMORE, *supra* note 2, § 2192 at 72.

4. 8 WIGMORE, *supra* note 2, § 2192 at 73.

duty. Hence, every privilege exercised in avoidance of the duty to testify is exceptional; it is of a profoundly unusual nature.[5] The strength of Wigmore's sentiment on this basic premise of civilized society is expressed as follows:

> *[A]ll privileges of exemption from this duty are exceptional* and therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.[6]

The corollary of the individual's duty to society is the society's obligation to *"make the duty as little onerous as possible"*[7] to minimize the burdens placed on those who fulfill their duties to testify. This expectation that society not unnecessarily burden one who performs his duty is not only satisfying to our basic sense of fairness but is also coherent from the point of view of rewards and reinforcers for behavior. A general unwillingness to assist the system of justice can be anticipated when those who do fulfill their duty are noticeably burdened by the performance of their duty.

Wigmore finds no difference in principle between the duty to testify and the duty to produce documents, since "to give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions."[8] Recognized privileges relating to documents include title deeds and securities under a lien, trade secrets, a civil party's documents, official documents, self-incriminating documents and various confidential communications.[9]

Because the individual has a duty to testify or produce documents as part of his overall obligation to assist in the maintenance of the rights of others, and thus the orderly continuation of a civilized society as a whole, the privileges are personal to their holder. Exceptions to the general duty are "in no sense provided for the *benefit of the litigant party* whose opponent is deprived by them of the evidence which he desires."[10] Claims of privilege must always be seen as obstacles to "the ascertainment of the

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5. *Id.*

6. *Id. Accord*, Falsone v. United States, 205 F.2d 734 (5th Cir. 1953); *In re* Story, 159 Ohio St. 144, 111 N.E.2d 385 (1953).

7. 8 WIGMORE, *supra* note 2, § 2192 at 73.

8. *Id.* § 2193 at 74-75.

9. *Id.* at 75.

10. *Id.* § 2196 at 111.

truth, and these are suffered only because the several extrinsic policies are deemed to be in these respects paramount to the purpose of ascertaining the facts in issue."[11] The basic question that always must be asked regarding a claim of privilege is whether the policy considerations protecting a witness in silence outweigh the purpose of judicial inquiry in the discovery of truth.

When a privilege is said to be personal, it means that only the individual who holds the privilege may claim it. Consequently, error in dishonoring the privilege can be objected to only by the individual holding the privilege. Since privilege operates against full disclosure of the truth, a party cannot be heard to complain of the improper denial of a privilege.[12] If, however, the court improperly honors a claim to privilege, then the party who attempted to obtain the testimony can complain, for his interests and the interest of the discovery of truth are abused by such an erroneous decision.[13]

In understanding privileges in general it is important to distinguish them from rules of exclusion, another means by which full disclosure of "evidence" is denied. Professor McCormick distinguished the two by identifying rules of exclusion as having the "common purpose to facilitate the ascertainment of the facts by guarding against evidence which is unreliable or is calculated to prejudice or mislead."[14] In high contrast are privileges that

> do not in any wise aid the ascertainment of truth, but rather . . . shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.[15]

Privileges are embodied in common law and statutes. Among the policy considerations in the development of a privilege are protected constitutional rights. A great body of law has grown up around the most clearly acknowledged privilege not to testify—that of the fifth amendment right not to incriminate oneself. That body of law attempts to construe the language of the constitutional conferment of the right. The law also specifies those who may be holders of the testimonial privilege based on this constitutional right and the circumstances under which the privilege can be successfully asserted. In other words, even though the policy favoring the avoidance of testimony is in part a constitutional right, the privilege will not be automatically honored. The United States Supreme

11. *Id.*

12. *Id.* at 112. Some courts do not hold to such a strict interpretation of holder of privilege and permit appeal to be based on an improper denial of privilege to a non-party. Cases are cited and discussed in C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 73 at 153 (Cleary ed. 1972) [hereinafter cited as MCCORMICK].

13. 8 WIGMORE, *supra* note 2, § 2196 at 113.

14. MCCORMICK, *supra* note 12, § 72 at 152.

15. *Id.* (citations omitted).

Court has acknowledged the importance of this privilege in forbidding comment upon the silence of one exercising the privilege[16] and by holding that one who remains in privileged silence shall "suffer no penalty" for his silence.[17] Wigmore contends that there is no agreement on the policy of the privilege against self-incrimination because there is no single privilege.[18] Rather, there are diverse circumstances and diverse potential holders of the privilege and diverse proceedings in which the privilege may be asserted.[19] Thus, even concerning the most broadly recognized privilege and one that is based unmistakably on constitutional protection, courts have faced and will continue to face the weighing of the policies in favor of the privilege against the desire for truth.

The focus of this Comment is on the rationale and extent of the privilege not to testify or produce documents with respect to one's associations. Peculiar to this privilege is the interplay between the first amendment rights and the alleged necessity of anonymity with respect to the exercise of those rights. In this regard, the rationale of the associational privilege appears most clearly in the context of Wigmore's four conditions for the establishment of a privilege against the disclosure of communications. Those four conditions are:

(1) The communication must originate in a *confidence* that they will not be disclosed.
(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[20]

While Wigmore employs this set of conditions to examine privileges such as attorney-client, husband-wife, and priest-penitent, it seems that these conditions can do much to bring out the structure of recognition of an associational right.

Finally, before turning to the associational right and its related privilege, it is important to observe two trends in the law of privileges, one of which operates in favor of and the other against a narrow construction or privileges. It has already been noted that the general principle is that one has a duty to testify and that exemptions from the duty are in discord with the purpose of a system of justice to find the truth. As McCormick has put a similar point, "the development of judge-made privileges virtually halted a century ago."[21] He further stated that "in more recent times the

16. Griffin v. California, 380 U.S. 609 (1965).
17. Malloy v. Hogan, 378 U.S. 1 (1964).
18. 8 WIGMORE, *supra* note 2, § 2251 at 295-318.
19. *Id.*
20. *Id.* § 2285 at 527 (emphasis in original) (citations omitted).
21. MCCORMICK, *supra* note 12, § 77 at 156.

attitude of commentators, whether from the bench, the bar, or the schools, has tended to view privileges from the standpoint of the hindrance to litigation resulting from their recognition [that the] granting of a claim of privilege can serve only to 'shut out the light' . . . ."[22]

A trend also is developing which recognizes that there is an ever-diminishing privacy.[23] That trend was acknowledged by McCormick in the following terms:

> The privileges have survived largely unaffected by . . . winnowings of the law by eminent scholars and jurists who saw them as suppressing the truth, for it is evident that for many people, judges, lawyers and laymen, the protection of confidential communications from enforced disclosure has been thought to represent rights of privacy and security too important to relinquish to the convenience of litigants. Growing concern in recent times with the increase in official prying and snooping into the lives of private individuals has reinforced support for the traditional privileges and no doubt aided in the creation of new ones.[24]

McCormick's conclusion with regard to these two outlooks is that no broad policy on privileges is appropriate. He states that

> [r]econciling interests in privacy and confidentiality with the needs of litigants is not readily achieved in terms of broad categories; it calls for the finer touch of the specific solution. A tool already at hand, though perhaps largely unrecognized, consists of recognizing standing on the part of the possessor of information to question the legitimacy of need for it in litigation, *i.e.*, to raise issues of relevancy in the broad sense.[25]

A demand for a plain showing of the benefit to be derived from the divulgence by an unwilling witness seeking the protected silence of privilege is the demand for a demonstration of relevancy of the testimony or document at issue. As McCormick suggested, a more vigorous challenge to relevancy of demanded information or documents may resolve the conflict between protection of privacy and discovery of truth without compromising either worthy objective.

II. NAACP v. Alabama

In the case of *NAACP v. Alabama* ex rel. *Patterson*,[26] the United States Supreme Court in a unanimous opinion decided several significant matters regarding the first amendment right to freedom of association. The case arose in response to a discovery demand by the state's Attorney General for membership lists of the Alabama NAACP resulting from NAACP failure to comply with the state statute regulating the operation of foreign corporations within the state. The United States Supreme Court

22. *Id.*
23. M. SLOUGH, FREEDOM AND RESPONSIBILITY (1969).
24. MCCORMICK, *supra* note 12, § 77 at 157.
25. *Id.* at 159.
26. 357 U.S. 449 (1958).

reviewed the validity of an Alabama state court civil contempt order against NAACP for refusing to divulge the lists.[27] The state statute in question required foreign corporations, unless otherwise exempted, to file a corporate charter with the Secretary of State and to designate an agent to receive service of process.[28] That statute did not itself require the disclosure of the names of members; a foreign corporation failing to comply with the statute, however, was subject to a fine and its officers to criminal prosecution.[29]

NAACP is a nonprofit organization, incorporated under the laws of New York.[30] The Certificate of Incorporation of NAACP indicates the purposes of the organization:

> [its] . . . principal objects . . . are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.[31]

These objectives are sought through chartered affiliates, which are themselves unincorporated associations. The first such affiliate chartered in Alabama was organized in 1918.[32] In 1951 a regional office was opened in Alabama with a staff of two supervisory persons and one clerical person.[33]

In 1956, the Attorney General of Alabama brought a suit in equity in the state circuit court seeking to enjoin NAACP from continuing business in the state because the association had never complied with the state's foreign corporation qualification statute.[34] The state complained that the noncompliance of NAACP with the qualification statute was "causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief. . . ."[35] The state court immediately issued an *ex parte* restraining order prohibiting NAACP from, *pendente lite*, "engaging in further activities within the State and

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27. *Id.* at 451.

28. *Id.*

29. ALA. CODE §§ 10.192-.198 (1940).

30. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451 (1958).

31. *Id.* at 451 n.1, *quoting* NAACP's Certificate of Incorporation.

32. *Id.* at 452.

33. *Id.*

34. *Id.* The suit alleged that NAACP had opened a regional office and had organized affiliates in the state, that it had recruited members and solicited contributions, that it had financially supported black students seeking admission to the state university and had provided legal assistance to those students, and that it had supported a black boycott of the bus lines in Montgomery, Alabama, which sought to compel the seating of passengers without regard to race. One can imagine that it was the bus boycott and the university admission efforts which dominated the more technical concerns with the organization of NAACP. Memberships perhaps would have been tolerable. Activism was not.

35. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 452 (1958).

forbidding it to take any steps to qualify itself to do business therein."[36]

In moving to dismiss the restraining order, NAACP maintained that it was exempt from the statute and, more importantly, that the state was seeking to violate the rights of freedom of speech and assembly guaranteed under the fourteenth amendment.[37] Prior to the hearing on the NAACP motion, the state requested the production of documents including bank statements, leases, deeds, and records that identified "members" and "agents" of the association.[38] These documents were alleged to be necessary for preparation for the hearing since NAACP had denied that it conducted intrastate business such that its organization would come within the qualification statute.[39] The court ordered the production of documents, including the membership lists, delaying the hearing on the NAACP motion until the documents were made available.[40]

NAACP then answered the equity complaint admitting that its activities were as alleged, that it had not qualified as the statute required, but still contending that the statute did not apply to NAACP. NAACP agreed to try to qualify under the statute, submitting the forms required, if the order barring it from attempting to qualify were to be lifted.[41] NAACP did not supply the demanded documents, however, and hence was held in civil contempt and fined 10,000 dollars; the fine was to be increased to 100,000 dollars if NAACP failed to comply within five days.[42]

While NAACP produced most of the documents demanded within the five-day period, it refused to turn over the membership lists, maintaining that the state could not constitutionally compel that disclosure.[43] Other motions in the state courts by NAACP were fruitless in protecting the membership lists and the Alabama Supreme Court refused certiorari to review the contempt judgment.[44] The United States Supreme Court then granted certiorari because of the constitutional issues involved.[45]

The two primary holdings[46] of the decision by the Supreme Court in *NAACP v. Alabama* are that (1) an organization has standing to assert the constitutional rights of its members of their behalf if to require the members to do so for themselves "would result in nullification of the right

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36. *Id.* at 452-53.
37. *Id.* at 453.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 453-54.
43. *Id.* at 454.
44. *Id.* The denial of certiorari was based first on the alleged insufficiency of petitioner's allegations and second on procedural grounds.
45. 353 U.S. 972 (1957).
46. The initial issue addressed by the Court was jurisdictional, the State having unsuccessfully contended that the petitioner had pursued the wrong appellate remedy. 357 U.S. at 454-55.

at the very moment of its assertion"[47] and (2) under the facts and circumstances of the case the production of membership lists would violate the members' constitutional right to freedom of association, "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[48]

III. STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS OF ANOTHER

The Court's discussion of the standing issue is relatively cryptic but nonetheless of continuing importance in the law. At first blush it would seem that the constitutional right to freedom of association is a right that is essentially personal. That is, it would certainly seem that an individual whose associations are in question would be the only one qualified to protect documents, information or testimony from the glare of public scrutiny by way of the claim that the matter is under the umbrella of the constitutional right to freedom of association. Yet, the Supreme Court reasoned that the organization may assert that right on behalf of its members.[49] It had been the continuing position of the Court that "parties rely only on constitutional rights which are personal to themselves."[50] This particular posture by the Court reflected a broader view that constitutional adjudication should be avoided whenever possible.[51] The Court stated that the principle is "not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court."[52]

An organization does have standing to assert constitutional rights of its members when, as in the instant case, to deny the organization the ability to assert the members' rights would be to deny that the individuals could assert the rights. The Court's reasoning was as follows:

> If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views. The reasonable likelihood that the Association itself through

47. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 468 (1958).
48. *Id.* at 468.
49. *Id.* at 458-59.
50. *Id.* at 459.
51. *Id.*
52. *Id.*

> diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members.[53]

This reasoning consists of several criteria that the Court applied in this case. The factors are: (1) whether the members would lose the right by claiming it, (2) whether the members and the association are "in every practical sense identical," (3) whether the association's constitution specifies that membership indicates accord between the member's beliefs and the association's principles, (4) whether the association's constitution indicates that the association is a "medium" for the effective expression of the member's views, and (5) whether disclosure of membership lists would diminish financial support and/or the number of members. Whether these criteria rise to the level of a "test" for standing to assert constitutional rights on behalf of another is not clear from subsequent cases relying on *NAACP v. Alabama*.[54] These factors may amount to a conclusive test or may be merely some of the variables to which a court could look to adjudge whether a party has standing to assert constitutional rights on behalf of another.

These factors may not be fully comprehensible when considered separately from the specific constitutional right at issue in this case, namely freedom of association. In fact, it is readily apparent, for example, that an individual's right to protection of a property interest against an unconstitutional taking would not be affected by the revelation that the individual was a member of an association that collectively owned the property in question.[55] Any danger of loss of one's freedom of association by disclosure may be peculiar to that constitutional right. Self-nullification of the right turns on the necessity of anonymity for freedom of association.

But is it a logically necessary feature of freedom of association that it will self-nullify upon assertion? To the contrary, members of an association could assert their rights to belong to an association in a universe of tolerant peers and authorities. The assertion that one is a member is not necessarily inconsistent with the freedom to be a member in an association. The assertion of association membership is not logically inconsistent with any other right or act, although, of course, one might well criticize an individual for acting in a manner that is inconsistent with the beliefs implied by association membership. Just the same, one might criticize an individual for asserting two inconsistent beliefs, or for asserting one belief and acting in a manner that implies or presupposes a belief quite

53. *Id.* at 459-60.

54. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106 (1976).

55. One could define a form of property ownership in such a way that anonymity was entailed. That is to say, while property ownership does not entail anonymity, "anonymous property ownership" would. But such could be said of any right which one has, *i.e.*, if it were a right to anonymously do X, now called the right to A, then one could not both do A and be forced to assert that one was doing A at the same time.

the contrary. In other words, while we might be displeased by the assertions and behavior of individuals which suggest that their reliance on inconsistent propositions, as in "I believe x" and "I believe not x," such conduct does not create the same kind of logical puzzle as Bertrand Russell's "This sentence is false."[56]

Perhaps the self-nullification factor depends on a presupposed anonymity requirement in association membership. It would be a logical puzzle for Sam Spade to assert "I am Sam Spade" if it were a necessary feature of *being* Sam Spade that he remain anonymous. This could not be a problem simply of one who ought to remain anonymous but then blows his own cover by revealing his identity. The logical puzzle could only arise in the anonymity case if the one who revealed his own identity could not be that individual and reveal his own identity. To reveal that you are who you are does not seem to present a logical dilemma except in the most extraordinary cases, if at all. In the same way, one who is a member of an association could logically be a member of the association and desire that he remain anonymous, and yet slip and reveal his own association membership.

The threat of disclosure of association membership may be a function of the nature of the constitutional guarantee to freedom of association. What the first amendment guarantees is not just that we can be members of some associations, but that we have the freedom to belong to those associations to which we choose to belong. Without tying these observations to a particular analysis of "freedom," it can safely be said that there is no logical inconsistency between being free to do Y and asserting that "I am doing Y." It also does not seem to be the case that there is any logical inconsistency between being free to do Y and being compelled to assert that "I am doing Y." Nor is there any logical inconsistency between the freedom of being a member of an organization and being compelled to assert that you are a member of that organization.

If the assertion of the constitutional right to freedom of association is threatened by self-nullification, that difficulty is one made in the practical world of human affairs, not in the logic of the concepts. A member of NAACP in Alabama in the 1950s, practically speaking, had the freedom to belong to that association if that individual was not compelled to publicly disclose his membership. Anonymity is not a logical feature of the freedom of association; but in some circumstances, anonymity is a practical necessity for the full exercise of freedom of association. It is the animosity toward a given organization at a given time and place that threatens the freedom to become a member of that organization. Hence, it is the perception of that animosity that inhibits the freedom one might otherwise have to join the organization. But for the animosity toward NAACP and the fear of the possibility that one's membership could be disclosed, the

56. B. RUSSELL, THE PRINCIPLES OF MATHEMATICS (1903).

freedom of association would remain whole. Thus, in a completely tolerant universe where there was no animosity toward any organization, self-disclosure of membership would not undercut one's freedom of association. In a society in which no individual perceived hostility toward any organization, freedom of association would not be touched by the forced disclosure of one's membership. While the factor of self-nullification—the destruction of one's right to freedom of association by the very act of asserting it—may appear to be the Court's identification of a logical relationship among the concepts, it is in fact an observation on the practical considerations of hostility and fear and the effect of those emotions on one's willingness to place oneself in jeopardy.[57]

The remaining factors noted by the Court make it more evident that it is the practical considerations that establish the context in which one's freedom of association is legitimately asserted by another party. The practical identity of the individual and the association, especially as demonstrated by the association's constitution indicating that the association is but a medium for the expression of the individual's beliefs and specifying that membership indicates that the member's beliefs and the association's principles are in accord, lends more of a gloss of propriety to the association's assertion of constitutional rights on the member's behalf. Superficially, the suggestion is that the identities are not wholly separate. But more importantly, to the extent that the association's principles reflect and reveal the member's beliefs, the mere identification of the fact of membership is a disclosure of the member's beliefs. Such revelations of members' beliefs about political and social change are not written on the face of a swim club membership; but they are with respect to membership in the Democratic Party or the Symbionese Liberation Army.[58]

Hence, while it may appear that the Court was identifying freedom of association as a constitutionally protected right that possesses the unique property of self-nullifying upon its very assertion, that property is not a logically necessary part of the right. Rather, the practical considerations of the context in which an individual might most wish to assert the freedom of association may be factually the context in which one would most like to have one's associations not disclosed. The use of pseudonyms by plaintiffs in matters of delicacy illustrates that an individual could assert a right and still be protected from disclosure of the fact that he is asserting the right. For the purposes of deciding standing of the party to assert that right, the

57. Perhaps on some philosophical views, were the world other than it is and people without fear and hostility, certain *logical* incoherencies would emerge or fade, logic having no independent purity, being rather an animal of human concepts. But the apparent elegance of the Court's proposition of self-nullification assumes that this constitutional right has a logical character that is independent of the factual context of human behavior.

58. This is not a claim that no particular political or social beliefs are suggested by membership in a swim club. Prospective Justices of the Supreme Court as well as other candidates for sensitive positions are sometimes embarrassed by the membership policies of the purportedly social organizations to which they belong.

Court's argument that anonymity may need to be preserved for the holder of the right is not persuasive that someone other than the holder of the right must assert the right.

It follows that in the discovery stages a demand for documents that reveal the membership of an organization is not a production demand that can be responded to only by the association. The individuals who consider their freedom of association to be at risk by the production demand could very well intervene in a Doe or Roe fashion to block the production.[59] While the procedure is slightly more circuitous than that permitted by the Court in *NAACP v. Alabama*, it would preserve the principle that the holder of the constitutional right is the one who must assert it rather than some third party on behalf of the holder of the right. Frustration of discovery is a serious impediment to the just resolution of a matter under litigation.[60]

Finally, with respect to the standing issue in *NAACP v. Alabama*, it must be noted that the association's standing to assert the right on behalf of the member is dependent upon the member's being entitled to assert the right. The key paragraph begins with the proviso: "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order. . . ."[61] Whether the rank-and-file members are constitutionally permitted to withhold their connection with the Association is a function of the analysis that the Court performs on "freedom of association."

IV. THE FUNDAMENTAL FREEDOM OF ASSOCIATION

The second major holding of the Court in *NAACP v. Alabama* was that "the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment."[62] The incorporation of first amendment rights in the due process clause of the fourteenth amendment and the protection of those rights against actions by the states had already been decided in a case a third of a century earlier.[63] While first amendment rights seem to be the central issue in this case, the operative language in the Court's description of the member's rights does not refer to the first amendment itself but rather only to the fourteenth amendment.[64] The protected right is

59. The procedure for filing a case in a pseudonym is such that NAACP members could have sued anonymously, according to Justice Blackmun in Singleton v. Wulff, 428 U.S. 106 (1976).

60. It should be noted that there is a significant difference between defendants who resist discovery in a case such as *NAACP* and plaintiffs who initiate the litigation and then refuse discovery. The former is unwillingly in court while the latter chose to be. Surely a factor in that choice must be the practicality and fairness of an adjudication when discovery is thwarted by the plaintiff.

61. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958).

62. *Id.* at 460.

63. Gitlow v. New York, 268 U.S. 652 (1925).

64. *See* Note, *Freedom of Association: Constitutional Right or Judicial Technique?*, 46 VA. L. REV. 730, 732 (1960).

described and the implication of first amendment rights is strongly suggested by the following passage:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedom of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . .[65]

Not only is this language suggestive of a first amendment issue, the cases cited by the Court in support of its position are all first amendment cases.[66]

Further language invites interpretation of this case as a first amendment case. Specifically the Court states: "Of course, it is immaterial whether the beliefs sought to be advanced by an association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to association is subject to the closest scrutiny."[67] And later: "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action."[68] Subsequent cases construe *NAACP v. Alabama* as a first amendment case holding that the first amendment is applicable whether the beliefs sought to be advanced " 'pertain to political, economic, religious, or cultural matters.' "[69] The Court also later held that "[o]ur decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."[70]

The import of the right at issue is that the Court correspondingly identified the right of freedom of association in a "close nexus" with the freedoms of speech and assembly and then treated association as a fundamental right, subjecting to the "closest scrutiny" any action by the state that might curtail that right.[71] Thus, the Court applied the so-called strict scrutiny test to the state's action. The state's action cannot be held to be constitutional if it has the consequence of discouraging freedom of association unless the state can show a compelling reason to do so.[72] The Court described as not a "novel" perception that "compelled disclosure of

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65. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (citations omitted).

66. Staub v. Baxley, 355 U.S. 313, 321 (1958); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Palko v. Connecticut, 302 U.S. 319, 324 (1937).

67. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

68. *Id.* at 461.

69. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 n.28 (1977), *quoting* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

70. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977).

71. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

72. *Id.* at 461-62.

affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as the other forms of governmental action previously found to be unconstitutional.[73] Freedom of association bears a vital relationship to privacy in one's association:[74]

> Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order [as requiring the wearing of identifying armbands]. Inviolability of privacy in group association *may in many circumstances* be indispensable to preservation of freedom of association particularly where a group espouses dissident beliefs.[75]

The nexus between privacy and freedom of association cannot simply be assumed. In the *NAACP* case the "petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[76] What NAACP succeeded in showing was that there was fear on the part of its members of the public disclosure of their association sufficient to affect their freedom to advocate certain beliefs through association. Furthermore, the Court viewed the fear to be rationally based on the reprisals that the members could well expect to follow from their public identification.[77] A showing that members experience fear presumably is not sufficient to deter discovery of membership lists. Rather, a showing that the members experience fear and that the fear is well-grounded is necessary to place the burden on the state to bring forward the justification for its discovery demand. One can infer that the members' paranoia alone would not thwart discovery. As was stated above, the hostility of the community and the fear of this hostility jointly form the threshold to a justifiable claim to the protection of one's privacy interests in one's associations.

A claim that it is the community's hostility rather than the acts of the state that is repressive was not favorably received by the Court. It stated: "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."[78] An "innocent" act by the state can be held unconstitutional if the milieu in the private sector subjects individuals to hostility and reprisals for their membership in an association. Proof of intent is not necessary if a causal relation exists between the state's acts and the prohibited consequences.

The state can preserve its discovery demand or rehabilitate it from

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73. *Id.* at 462.
74. *Id. See* text accompanying notes 55-61 *supra.*
75. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (emphasis added).
76. *Id.*
77. *Id.* at 462-63.
78. *Id.* at 463.

apparent unconstitutionality by bringing forward compelling reasons for it. The Court's rule on this matter is as follows:

> The final question [is] whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association.[79]

The standard is that the " 'subordinating interest of the State must be compelling.' "[80] Alabama, therefore, was faced with presenting a "justification" for its demand for NAACP membership lists. The state's interest in the documents was: (1) "whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute," and (2) "whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State."[81] Rather than passing on the merits of the issues the Court stated that it found that the membership lists had no bearing on those issues.[82] The Court held that the state had not shown interest in the membership lists sufficient to "overcome petitioner's constitutional objections to the production order."[83]

The Court provided some insight into what it was seeking in the way of justification by the state in the course of distinguishing *NAACP* from another case of notable similarity. In *Bryant v. Zimmerman*,[84] the Court upheld the interests of the state in the membership of an individual in a New York chapter of the Ku Klux Klan. The state statute in question required the filing of the constitution, by-laws, rules, regulations, oath of membership and roster of members and officers by an unincorporated association that demanded an oath as a prerequisite or condition of membership, other than a labor union or a benevolent order.[85] Furthermore, the New York statute provided a criminal misdemeanor sanction for "[a]ny person who becomes a member of any such corporation or association, or remains a member thereof, or attends a meeting thereof, with knowledge that such corporation or association has failed to comply . . ." with the statute.[86]

The *NAACP* Court distinguished *Bryant* on two grounds: (1) New York statutory enforcement against the Klan was justified by the "particular character of the Klan's activities, involving acts of unlawful

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79. *Id.*
80. *Id. quoting* Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957).
81. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464 (1958).
82. *Id.*
83. *Id.* at 465.
84. 278 U.S. 63 (1928).
85. *Id.* at 66.
86. *Id.*

intimidation and violence"[87] and (2) NAACP had made some effort to comply with the requirements of Alabama's statute (at least it did under the directive of the contempt citation), while the parties in *Bryant* refused to furnish the state with any information.[88] It is not clear why partial compliance with the state's discovery demand in *NAACP* makes the organization that much less subject to the force of the law. Perhaps the Court took partial compliance as a good faith effort to do all that NAACP felt it could. The organization then drew the line at the point necessary to protect the constitutional rights of the rank-and-file members. The state having failed to produce a "controlling" reason for access to the NAACP membership list in particular, the right of freedom of association prevailed. Refusal to comply with the New York statute in all respects indicated a general recalcitrance on the part of the petitioner rather than the selective and refined objection of NAACP.

The former reason for distinguishing *Bryant* is much more interesting. The Court looked through the general freedom of association or speech to the nature of the principles which the members espouse. That is, in *Bryant* the Klan was said to believe in, express and act on principles of violence and intimidation. In resisting the argument that the New York statute failed to provide fourteenth amendment equal protection to different classes the Court observed:

> The courts below recognized the principle shown in the cases just cited and reached the conclusion that the classification was justified by a difference between the two classes of association shown by experience, and that the difference consisted (a) in a *manifest tendency* on the part of one class to make the secrecy surrounding its purposes and membership a cloak for *acts and conduct* inimical to personal rights and public welfare, and (b) in the absence of such a tendency on the part of the other class. In pointing out this difference one of the courts said of the Ku Klux Klan, the principal association in the included class: "It is a matter of common knowledge that this organization functions largely at night, its members disguised by hoods and gowns and doing things calculated to strike terror into the minds of the people"; and later said of the other class: "These organizations and their purposes are well known, many of them having been in existence for many years. Many of them are oath-bound and secret. But we hear no complaints against them regarding violation of the peace or interfering with the rights of others. . . ."[89]

The Court singled out the Klan as an appropriate organization to lack the right to protection of its freedom of association—not because of beliefs that draw the members together—but because of the "manifest tendency" of the organization to use its secrecy to cloak "acts and conduct" that are "inimical to personal rights and public welfare."[90] While NAACP did not

87. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 465 (1958).

88. *Id.* at 466.

89. 278 U.S. 63, 75 (1928) (emphasis added).

90. *Id.*

gather merely to share beliefs but to act in certain ways, the objectives of NAACP were evaluated by the Court as more acceptable objectives than those pursued by the Klan.

Hence, what distinguishes the freedoms of the members of the two organizations is not the formal properties of right to speech and assembly but the content of their respective beliefs. Perhaps this observation goes too far. The acts themselves are distinguishable in that one organization is willing to act violently while the other is not. But the Court's language is "manifest tendency" to cloak its acts in secrecy that are inimical to personal rights and public welfare. That is, the Court considers it proper to protect members' freedom of association if the members do not have a tendency to act contrary to personal rights and public welfare. Surely the belief structure that suggests this tendency need not be actually manifested in the violation of personal rights in fact. The Court thus must be distinguishing between two tendencies or inclinations on the basis of the content of the beliefs espoused by the members rather than the acts that those members have actually performed.

The implications of the Court's analysis in *NAACP* of freedom of association suggest that protection of membership and membership lists is available only if (1) the association in question is one engaged in advocacy of beliefs whether political, economic, religious or cultural; (2) the freedom of association is therefore in close nexus with freedoms of speech and assembly; (3) the intrusion into the privacy of association meets a strict scrutiny test—the complaining party has shown justifiable fear of disclosure in its members and the discovering party has failed to demonstrate a compelling interest in the information; (4) the party refusing discovery has made a good faith effort to comply with discovery; (5) the information does not seem to be relevant to the matter being litigated; (6) the disclosure of membership is repressive because of the state's own actions or the consequences of the state's actions; and (7) the Court does not find the objectives of the organization or the conduct of its members indicative of a tendency to act in a way inimical to personal rights or public welfare.

While *NAACP v. Alabama* is a monumental case in the area of protection of privacy in one's associations, it was not the last word on the subject. Even within the narrow confines of that particular fact pattern the case came before the United States Supreme Court three more times before being resolved. In 1958 in *NAACP v. Alabama* ex rel. *Patterson*, the Court reversed the contempt judgment without reaching the merits of the restraining order.[91] The Alabama Supreme Court on remand affirmed the contempt judgment. The United States Supreme Court in *NAACP v. Alabama* ex rel. *Patterson*[92] remanded again having found that the state

91. 357 U.S. 449 (1958).
92. 360 U.S. 240 (1959).

court had shifted its premises between its two decisions. The Alabama State Supreme Court did not readily present NAACP with an opportunity for a hearing on its case and so the Association initiated a suit in the United States District Court for the Northern District of Alabama alleging violation of constitutional rights and seeking an injunction against the restraining order. The action was dismissed by the district court,[93] with the court of appeals in turn holding that the matter belonged in the state courts but vacating the district court's judgment and remanding with instructions "to permit the issues to be determined with expedition in the State courts."[94] The United States Supreme Court took jurisdiction for the third time in 1961, ordering that a trial of the issues in the case begin no later than January 2, 1962, on the matter of NAACP's motion to dissolve the state's June 1, 1956, restraining order.[95] The state circuit court held the required hearing and found on December 29, 1961, that NAACP was in continuing violation of the state's foreign corporation qualification statute. The circuit court permanently enjoined NAACP and its affiliates from doing business of any kind in Alabama or attempting to qualify to do so. The Alabama Supreme Court, relying on a procedural point, affirmed that decision.[96] The United States Supreme Court again granted certiorari and concluded finally, again in a unanimous single opinion decision, that

> [t]he judgment below must be reversed. In view of the history of this case, we are asked to formulate a decree for entry in the state courts which will assure the Association's right to conduct activities in Alabama without further delay. While such a course undoubtedly lies within this Court's power, *Martin v. Hunter's Lessee*, 1 Wheat. 304, we prefer to follow our usual practice and remand the case to the Supreme Court of Alabama for further proceedings not inconsistent with this opinion. Such proceedings should include the prompt entry of a decree, in accordance with state procedures, vacating in all respects the permanent injunction order issued by the Circuit Court of Montgomery County, Alabama, and permitting the Association to take all steps necessary to qualify it to do business in Alabama. Should we unhappily be mistaken in our belief that the Supreme Court of Alabama will promptly implement this disposition, leave is given the Assocation to apply to this Court for further appropriate relief.[97]

To the extent that courts reflect a community's hostility towards a given association, that is, under precisely those circumstances in which the members most need their privacy guaranteed, protracted litigation such as that displayed in the *NAACP* cases may be necessary to insure the protection of constitutional rights.

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93. NAACP v. Gallion, 190 F. Supp. 583 (M.D. Ala. 1960).
94. NAACP v. Gallion, 290 F.2d 337, 343 (5th Cir. 1961).
95. NAACP v. Gallion, 368 U.S. 16 (1961).
96. NAACP v. Alabama, 150 So. 2d 677 (Ala. 1963).
97. 377 U.S. 288, 310 (1964).

V. THE MEANINGS OF NAACP v. ALABAMA TO THE SUPREME COURT

A. *The Douglas Dissents*

On the same day that the Supreme Court issued *NAACP v. Alabama* the case was relied upon in a manner that turned out to be prophetic of a frequent use. Justice Douglas in many eloquent dissents appealed to the absolute right of freedom of association that he maintained was established in the *NAACP* case. Chronologically first among those dissenting opinions is that of *Beilan v. Board of Public Education*.[98] In that case a public school teacher in Philadelphia had been questioned by the school superintendent concerning his communist affiliations and associations and had refused to answer. The superintendent warned the petitioner that his refusal might lead to his dismissal; following an administrative hearing dealing with the teacher's incompetency, as evidenced by his refusal to answer the questions, he was dismissed. The Supreme Court held that the dismissal did not violate the petitioner's fourteenth amendment rights to due process. Justice Burton wrote the opinion for the Court. Justice Douglas was joined in his dissent by Justice Black. The lesson of *NAACP* was stated pointedly:

> [G]overnment has no business penalizing a citizen merely for his beliefs or associations. It is government action that we have here. It is government action that the Fourteenth and First Amendments protect against. We emphasized in *N.A.A.C.P. v. Alabama*, decided this day, . . . that freedom to associate is one of those liberties protected against governmental action and that freedom from "compelled disclosure of affiliation with groups engaged in advocacy" is vital to that constitutional right. We gave protection in the *N.A.A.C.P.* case against governmental probing into political activities and associations of one dissident group of people. We should do the same here.[99]

Justice Douglas read *NAACP* broadly. For him the case stood for a general proposition of nonintrusion by government into the beliefs of citizens.

Also dissenting in *Beilan*, Justice Brennan drew the scope of *NAACP* more narrowly. He construed the holding of *NAACP* to support the view that when state actions touch important political rights, close judicial scrutiny by the Court is necessary. He stated, in part:

> [A]s a generality . . . government is never at liberty to be arbitrary in its relations with its citizens, and close judicial scrutiny is essential when State action infringes on the right of a man to be accepted in his community, to express his ideas in an atmosphere of calm decency, and to be free of the dark stain of suspicion and distrust of his loyalty on account of his political beliefs

98. 357 U.S. 399 (1958).

99. *Id.* at 414 (Douglas, J., dissenting).

> and associations. *N.A.A.C.P. v. Alabama* . . . decided this day. It is these rights which stand before the bar today, and it is in the awareness of their implications that these cases must be decided.[100]

Thus, on the day of the *NAACP* decision, at least, Justices Douglas, Black and Brennan believed the case stood for a generalized protection from governmental imposition on the individual because of the individual's beliefs. The *Beilan* case did not deal with membership lists or production of documents. Beilan did not have to make an antecedent showing of legitimate fear of reprisals for his associations since he had already been dismissed from employment. What was at issue was not the association to which he belonged but the fact that he refused to answer whether he was a member of a certain class of associations.[101]

In both his majority opinions and dissents, Justice Douglas raised the banner of the *NAACP* case. In a brief opinion by Justice Douglas, the Supreme Court enjoined the enforcement of Louisiana state statutes that, *inter alia*, required the filing of lists of officers and members of the NAACP with the Secretary of State of Louisiana.[102] The state had brought the action to enjoin the NAACP from doing business in Louisiana for failure to comply with this requirement. Some NAACP affiliates in Louisiana had already complied and there was evidence before the Court that members identified on those filings had been subjected to economic reprisals.[103] The temporary restraining order against the enforcement of the statutes was to become a permanent injunction if, on hearing in the lower courts, it became apparent that disclosure of membership lists would result in reprisals against and hostility towards the members.[104]

The broader reading of *NAACP* substantially underwrote several Douglas dissents in the early 1960s on the unpopular subject of subversive activities.[105] The Court held in *Communist Party of the United States v. Subversive Activities Control Board*[106] that the demand for registration of party members was not unconstitutional, distinguishing *NAACP* and related cases on the ground that the magnitude of the interests protected by registration satisfied the requirement that the state have a substantial or

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100. *Id.* at 418-19 (Brennan, J., dissenting).

101. Perhaps the results in *Beilan* confirm that an individual is awkwardly placed if he must assert his constitutional right not to reveal his associational membership—a basic premise of the standing argument in *NAACP*, 357 U.S. 449. It was Beilan's refusal to answer, the equivalent of his assertion of his constitutional right not to have to disclose his associations, that resulted in the reprisal.

102. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961).

103. *Id.* at 295-96.

104. *Id.* at 296.

105. In one term, October 1961, Justice Douglas dissented in three cases in which he cited *NAACP*, for basic propositions of law. Two are discussed in the text, but it also should be noted that Justice Douglas dissented from the dismissal of the appeal in Poe v. Ullman, 367 U.S. 497 (1961), taking the position that a controversy did exist in the challenge to the Connecticut contraceptive statute that merited adjudication of a constitutional issue. Citing *NAACP*, Justice Douglas stated," 'Liberty' is a conception that sometimes gains content from the emanations of other specific guarantees." Poe v. Ullman, 367 U.S. at 517 (Douglas, J., dissenting).

106. 367 U.S. 1 (1961).

compelling interest to access to membership lists.[107] In his dissent, Justice Douglas contended that freedom of association is in "the bundle of First Amendment rights,"[108] and that:

> In *N.A.A.C.P. v. Alabama*, . . . the Association was allowed to assert its members' constitutional rights: "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical." We dealt there with a Negro group asserting the First Amendment rights of its members. The members, it was argued, would be harassed if their names were disclosed and that harassment would abridge their First Amendment rights. We agreed with that view, and held that N.A.A.C.P. could not be forced to disclose to Alabama its membership lists. We did not, I assume, write a rule good for that day only. Nor did I think we wrote only for Negro groups.[109]

Though Justice Douglas usually concerned himself with the substantive right of freedom of association and not the standing issue, when it appeared to him that harassment of members could be presumed he would shift the focus to the issue of standing to assert the right, as he did in *Communist Party v. Subversive Activities Control Board.*

His position on the standing issue appeared to be one ultimately of indifference. The least concern in freedom of association was potential injury to the corporation itself, or so Douglas intimated in a separate opinion in yet another case. For abstention reasons the Court reversed, vacated and remanded trespass convictions for a sit-in.[110] In Appendix I to his separate opinion for the result of reversing and dismissing the indictment Justice Douglas stated:

> At times a corporation has standing to assert the constitutional rights of its members, as otherwise the rights peculiar to the members as individuals might be lost or impaired. Thus in *NAACP v. Alabama*, the question was whether the N.A.A.C.P. as a membership corporation, could assert on behalf of its members a right personal to them to be protected from compelled disclosure by the state of their affiliation with it. In that context we said the N.A.A.C.P. was "the appropriate party to assert these rights, because it and its members are in every practical sense identical." We felt, moreover, that to deny the N.A.A.C.P. standing to raise the question and to require it to be claimed by the members themselves "would result in nullification of the right at the very moment of its assertion." Those were the important reasons governing our decision, the adverse effect of disclosure on the N.A.A.C.P. itself being only a make-weight.[111]

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107. *Id.* at 93-94.

108. *Id.* at 171 (Douglas, J., dissenting).

109. *Id.* at 185 (Douglas, J., dissenting) (citations omitted).

110. Bell v. Maryland, 378 U.S. 226 (1964).

111. *Id.* at 267 (Douglas, J., in a separate opinion joined by Goldberg, J.) (citations omitted).

This candid observation reinforces the conclusion that for Justice Douglas, in particular, *NAACP* stands for the first amendment constitutional protection of information regarding one's associations. The significance of *NAACP* for him is not in the technicalities of the issue of standing of the association itself.

Whether members of an organization justifiably feared disclosure of their membership was a criterion that the Court has construed both broadly and narrowly. This criterion is part of the consideration of the well-being of the corporation itself, which Justice Douglas lightly dismissed as makeweight.[112] In *Talley v. California*[113] the Court held that a city statute which prohibited the distribution of handbills that did not identify the person who prepared and distributed them was void on its face and reversed Talley's conviction. Justice Black, writing for the Court, stated that "[s]tates may not compel members of groups engaged in the dissemination of ideas to be publicly identified . . . . The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters . . . ."[114] In the *Talley* case a dissenting opinion by Justices Clark, Frankfurter and Whittaker reminded the Court of the burden that a petitioner such as Talley had to bear:

> Unlike *N.A.A.C.P. v. Alabama*, . . . which is relied upon, there is neither allegation nor proof that Talley or *any group sponsoring him* would suffer "economic reprisals, loss of employment, threat of physical coercion [or] other manifestations of public hostility." . . . Talley makes no showing whatever to support his contention that a restraint upon his freedom of speech will result from the enforcement of the ordinance. The existence of such a restraint is necessary before we can strike the ordinance down.[115]

While the Court gradually drifted away from looking for injury to the association itself, a defined position regarding the need to show likelihood of harm to members did not emerge for some time.

In the same period, Douglas opinions gave shape to the freedom of association that reflected his view of the *NAACP* case. Clearly following the precedent of *NAACP*, the case of *Bates v. Little Rock*[116] held that individual officials of NAACP could not be required to divulge membership lists under the requirements of municipal occupational license tax ordinances. The opinion of the Court, delivered by Justice Stewart, recited the teachings of *NAACP v. Alabama*. The right to peaceable assembly, like freedom of speech and a free press, lie at the foundation of a government based upon consent of an informed citizenry.[117] Freedom of association is protected by the due process

112. *Id.*
113. 362 U.S. 60 (1960).
114. *Id.* at 65.
115. *Id.* at 69 (emphasis added) (citations omitted).
116. 361 U.S. 516 (1960).
117. *Id.* at 522-23.

clause of the fourteenth amendment.[118] These freedoms are protected against both obvious and subtle governmental attack.[119] The Court recognized a "vital relationship" between freedom to associate and privacy of association.[120] When a group espouses dissident beliefs, privacy in association may be indispensable to preserve freedom of association.[121] The Court held that the record showed that compulsory disclosure of NAACP membership lists would "work a significant interference with the freedom of association of their members."[122] Public disclosure had been followed by harassment.[123] The Court noted that the "repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names."[124] The state showed no compelling reasons that would subordinate the interests of the members.[125] Justice Stewart's opinion seems forceful enough. Yet Justice Black, joined by Justice Douglas wrote a concurring opinion that suggests a desire to elevate the freedom of association to an even more protected status than perhaps it had previously held.

> [W]e believe, as we indicated in *United States v. Rumely*, . . . that First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right as *N.A.A.C.P. v. Alabama*, and *De Jonge v. Oregon*, . . . hold. These are principles applicable to all people under our Constitution irrespective of their race, color, politics, or religion. That is, for us, the essence of the present opinion of the Court.[126]

The language "beyond abridgment" indicates that a statute or ordinance that threatens to impose on free speech and associated rights is unconstitutional even without the sequence of tests that requires a showing by the claimant that the fear of harassment is justifiable.

B. *Effects of the Douglas Dissents*

It was clear to the Court, and to Justice Douglas in particular, that NAACP membership in the South in the 1950's was dangerous. It also seemed to have been clear to the Court that the goals and objectives of NAACP were such as to be encouraged. Thus, while the Court required a

118. *Id.* at 523.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 524.
124. *Id.*
125. *Id.*
126. *Id.* at 528 (Black and Douglas, JJ., concurring) (citations omitted).

showing of justifiable fear of harassment and reprisal before giving the protection to the freedom of association that could be overcome only by compelling state interest, these features were so prominent in the *NAACP* cases that the structure of the test slipped away. Two effects of that habit of thought can be found in the 1960s cases. The first is that the reasoning transferred to other unpopular groups quite readily for Justice Douglas, reading *NAACP* as broadly as he did, and it transferred grudgingly if at all to "subversive" groups for much of the rest of the Court. The second effect is that the notion of protected "speech" expanded surprisingly in civil rights cases from this era.

1. *Not for Negroes Only*

As to the first effect, Justice Douglas was heard early on to say that the *NAACP* principle was not for Negroes only.[127] In *Uphaus v. Wyman*,[128] the Court dismissed for want of jurisdiction a case on appeal in which an individual was jailed for civil contempt. The case concerned the defendant's refusal to obey a state court order to produce the names of people who attended a summer camp that the state Attorney General was investigating as possibly including "subversive" persons. Two dissenting opinions were written, one by Justice Black with Justices Warren and Douglas joining and the other by Justice Douglas with Justices Warren and Black joining. Justice Black's opinion stated in essence that the imprisonment of Uphaus was

> another of that ever-lengthening line of cases where people have been sent to prison and kept there for long periods of their lives because their beliefs were inconsistent with the prevailing views of the moment. I believe the First and Fourteenth Amendments were intended to prevent any such imprisonments in this country.[129]

The Douglas dissent laid out several reasons for noting jurisdiction, the most vigorously argued of which was the *NAACP* precedent. After quoting *NAACP* at length,[130] Justice Douglas noted that *Bates v. Little*

127. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 185 (1961) (Douglas J., dissenting); Bates v. Little Rock, 361 U.S. 516, 528 (1960) (Black and Douglas, JJ., concurring); Beilan v. Board of Pub. Educ., 357 U.S. 399, 414 (1958) (Douglas, J., dissenting).

128. 364 U.S. 388 (1960).

129. *Id.* at 400 (Black, J., dissenting, joined by Warren, C. J., and Douglas, J.).

130.

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn. v. Douds*, [339 U.S. 382], at 402: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. *Cf. United States v. Rumely*, [345 U.S. 41], at 56-68 (concurring opinion).

364 U.S. 388, 405-06 (1960) (Black, J., dissenting, joined by Warren, C.J., and Douglas, J.).

Rock[131] had also held that an individual custodian of records did not have to release membership lists to city officials. He repeated that the principle of *NAACP* is not a rule for Negroes only.[132] But Justice Douglas bypassed the requirement that the claimant show the likelihood of injury if the information were to be divulged. Rather, Justice Douglas pummeled the Court with rhetorical questions. "Can there be any doubt that harassment of members of World Fellowship, Inc., in the climate prevailing among New Hampshire's law-enforcement officials will likewise be severe?"[133] And again, "Can there be any doubt that its members will be as closely pursued as might be members of N.A.A.C.P. in some communities?"[134] The first amendment protections extend to communists as well as NAACP members.[135] Since *Bates* and *Uphaus* both contained the issue of an individual refusing to disclose membership lists, the Court ought to have taken jurisdiction in *Uphaus*, for as Justice Douglas put it, "[w]e cannot administer justice with an even hand if we allow Bates to go free and Uphaus to languish in prison."[136]

As the number of "subversive" activities cases increased before the Court and as they were decided contrary to what Justice Douglas apparently saw as the unmistakable and broad mandate of *NAACP*, the Douglas concurrences and dissents blossomed into full-blown speeches, veritable treatises of the history of the Constitution and diverse theories of government. These concurrences and dissents do not lack in eloquence. Nor does it seem that they lacked a persuasive effect on Justice Douglas' brethren as time wore on. In *Scales v. United States*,[137] the petitioner was convicted under the Smith Act for being an "active" member of an organization—the Communist Party of the United States—that advocated the violent overthrow of the government. Justice Douglas waxed both historical and theoretical in his dissenting opinion. Imbedded in this dissent is the idea that freedom of association is like an absolute, if not actually an absolute, right.[138] His opinion stated, in part:

> Of course, government can move against those who take up arms against it. Of course, the constituted authority has the right of self-preservation. But we deal in this prosecution of Scales only with the legality of ideas and beliefs, not with overt acts. The Court speaks of the prevention of "dangerous behavior" by punishing those "who work to bring about that behavior." That formula returns man to the dark days when government determined what

131. 361 U.S. 516 (1960).

132. 364 U.S. 388, 406 (1960).

133. *Id.* at 407. Note 3 from this passage states:
The Attorney General of New Hampshire in the motion to dismiss in this case states, "Those who voluntarily and knowingly appear with and otherwise act in concert with Communists or former Communists in America cannot possibly have any reasonable right of privacy in regard to such activities . . . ."

134. *Id.* at 407.

135. *Id.*

136. *Id.* at 408.

137. 367 U.S. 203 (1961).

138. *See* text accompanying note 126 *supra*.

> behavior was "dangerous" and then policed the dissidents for tell-tale signs of advocacy. . . .[139]

The development of a balancing test between first amendment rights and the interests of the state had become an index of erosion in the status of the Bill of Rights. Justice Douglas wrote:

> In recent years we have been departing, I think, from the theory of government expressed in the First Amendment. We have too often been "balancing" the right of speech and association against other values in society to see if we, the judges, feel that a particular need is more important than the Bill of Rights. . . . This approach, which treats the commands of the First Amendment as "no more than admonitions of moderation" (see Hand, The Spirit of Liberty (1960 ed.), p. 278) runs counter to our prior decisions.[140]

To reject the balancing test is ultimately to make first amendment rights, including freedom of association, impervious to any governmental intrusion unless and until an overt criminal act issues from the beliefs. That only criminal conduct can justify governmental inquiry into the privacy of one's beliefs and associations is further elaborated in Justice Douglas' concurring opinion in *Gibson v. Florida Legislative Investigation Committee*.[141] He observed that "the right of association has become a part of the bundle of rights protected by the First Amendment. . . , and the need for a pervasive right of privacy against government intrusion has been recognized, though not always given the recognition it deserves."[142] In an extended footnote, Justice Douglas indicated what he considered the appropriate scope of this privacy:

> Whether the problem involves the right of an individual to be let alone in the sanctuary of his home or his right to associate with others for the attainment of lawful purposes, the individual's interest in being free from governmental interference is the same, and, except for the limited situation where there is "probable cause" for believing that he is involved in a crime, the government's disability is equally complete.[143]

Justice Douglas insisted that if a group engaged in criminal conduct it could be prosecuted and its members could be investigated.[144] No belief can in and of itself permit government intrusion. "Government can intervene only when belief, thought, or expression moves into the realm of action that is inimical to society."[145]

There is no doubt that some commentators find such a position repugnant to the rationale for first amendment rights. It has been argued that structural analysis of the Constitution will reveal what history cannot,

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139. Scales v. United States, 367 U.S. 203, 270 (1961) (Douglas, J., dissenting).
140. *Id.* at 270-71 (Douglas, J., dissenting) (citations omitted).
141. 372 U.S. 539 (1963).
142. *Id.* at 569 (Douglas, J., concurring) (citation omitted).
143. *Id.* at 569 n.7 (Douglas, J., concurring).
144. *Id.* at 571 (Douglas, J., concurring).
145. *Id.* at 573 (Douglas, J., concurring).

namely the basic meaning of the first amendment.[146] BeVier agrees with other commentators that "the constitutional process of self-government provides an indispensable clue to the meaning of the first amendment."[147] That conclusion is broadened to the notion that "the amendment protects the process of forming and expressing the will of the majority according to which our representatives must govern."[148] BeVier derives from these concepts the position that

> to read the amendment as protecting speech that advocates forcible overthrow of the government or the violation of duly enacted law, however, would distort the amendment's fundamental principle. . . . The basis for excluding subversive advocacy or incitement to unlawful action from first amendment protection is thus not that such speech is harmful in itself or that it lacks social utility. . . . Rather, these kinds of speech are excluded because to *include* them would be fundamentally inconsistent with the amendment's underlying constitutional principle, because they necessarily imply processes of decision making wholly antithetical to the process implied by the structure of the Constitution.[149]

Attractive though BeVier's view may be for its theoretical elegance, the course that the Court followed was to extend the first amendment protection of freedom of association to membership in "subversive" organizations. The Court did this in the context of analyzing what behavior was to be considered acts of speech.

2. *Political Speech Acts*

While the Court debated whether the protection of freedom of association that was so evidently deserved by NAACP was equally deserved by Communists, the domain of protected speech by members of NAACP was expanding. In a most notable case, *NAACP v. Button*,[150] the Court held to be unconstitutional a Virginia statute that outlawed "solicitation" of legal business. NAACP challenged the statute because it infringed "the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. . . ."[151] The right to associate sheltered the form of expression that the statute held to be illegal. Thus, NAACP contended that "the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments. . . ."[152] The Court took the position that certain actions

146. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

147. *Id.* at 309.

148. *Id.*

149. *Id.* at 309-11.

150. 371 U.S. 415 (1963).

151. *Id.* at 428.

152. *Id.* at 428-29.

were forms of political expression and were thereby protected. Citing *NAACP v. Alabama*, the Court stated that "there is no longer any doubt that the First and Fourteenth Amendments protected certain forms of orderly group activity."[153] For NAACP, at least, litigation is political expression, as the Court stated:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.[154]

The opinion of the Court disavowed the defense of the Virginia statute that its only purpose was insuring high professional standards.[155] In *Button* the Court set out a principle that "a State may not, under the *guise* of prohibiting professional misconduct, *ignore* constitutional rights."[156] In *NAACP v. Alabama* the principle announced was that "[I]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action."[157]

Both the purpose of limiting and the effect of limiting first amendment rights were disallowed in *Bates v. Little Rock*.[158] Therefore, in three closely analogous cases decided in a period of less than five years, the Court denounced state action that ignored, unintentionally abridged, purposefully limited or effectively limited first amendment rights of freedom of association. The dust is still settling on the necessity of showing intent to discriminate.[159]

In addition to the matter of purpose, intent or effect of state action in violation of first amendment rights, the Court was also struggling with the breadth of action that could be considered within the scope of the first amendment. As the Court held in *Button*, following the reasoning of *NAACP v. Alabama*, orderly group activity including solicitation of legal cases is encompassed by first amendment protection.[160] Dissenting Justices Harlan, Clark, and Stewart resisted the expansion of protected activity in *Button*. The dissent allowed that under the authority of *NAACP*

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153. *Id.* at 430.

154. *Id.* at 429.

155. *Id.* at 438-39.

156. *Id.* at 439 (emphasis added).

157. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958) (emphasis added).

158. Bates v. Little Rock, 361 U.S. 516, 524 (1960).

159. Justice Douglas bristled early against intentional segregation but also embraced the principle that motive does not matter when segregation is the effect. *See* Wright v. Rockefeller, 376 U.S. 52, 61-62 (1964) (Douglas, J., dissenting).

160. NAACP v. Button, 371 U.S. 415, 428-29 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958).

v. Alabama, Bates v. Little Rock and *Thomas v. Collins*, "[f]reedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective."[161] While not abhorring litigation as a way of resolving disputes, the dissent argued that

> to declare that litigation is a form of conduct that may be associated with political expression does not resolve this case. Neither the First Amendment nor the Fourteenth constitutes an *absolute* bar to government regulation in the fields of free expression and association. This Court has repeatedly held that certain forms of speech are outside the scope of the protection of those Amendments, and that, in addition, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, are permissible when they have been found justified by subordinating valid governmental interests. . . ." The problem in each such case is to weigh the legitimate interest of the State against the effect of the regulation on individual rights.[162]

Justices Harlan, Clark, and Stewart resisted the treatment of first amendment rights as "absolute." Part of that resistance consisted of refusing to extend the protection from the sphere of pure speech to conduct as speech. They wrote "[b]ut as we move away from speech alone and into the sphere of conduct—even conduct associated with speech or resulting from it—the area of legitimate governmental interest expands."[163] And the implication for them of that view in the case of *Button* was that "litigation, whether or not associated with the attempt to vindicate constitutional rights, is *conduct*; it is speech *plus*."[164]

Comparison of the majority and dissenting views in *Button* illustrates the differing interpretations of the form of "expression" that the authority of *NAACP v. Alabama* staked out as protected. The protection afforded by *NAACP* was being stretched in two directions. First, the language of the case legitimized the protection of freedom of association from inhibitory effects of state action, even if those effects were not intended.[165] Second, the language of the case legitimized the protection of a variety of forms of expression in advocacy. Those forms of expression have included promotion of litigation[166] and sit-ins.[167]

The division in the Court regarding the appropriate rationale for the protection of civil rights activists in the 1960s is poignantly displayed in *Brown v. Louisiana*.[168] Louisiana libraries were racially segregated and

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161. NAACP v. Button, 371 U.S. 415, 452 (1963) (Harlan, Clark, and Stewart, JJ., dissenting).

162. *Id.* at 453 (Harlan, Clark, and Stewart, JJ., dissenting) (emphasis added) (citation omitted).

163. *Id.* at 454 (Harlan, Clark, and Stewart, JJ., dissenting).

164. *Id.* at 455 (Harlan, Clark, and Stewart, JJ., dissenting).

165. The protection in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), was from the harm that could arise from the private sector once the state forced disclosure of the membership lists.

166. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963).

167. *E.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Barr v. City of Columbia, 378 U.S. 146 (1964).

168. 383 U.S. 131 (1966).

petitioner and others entered a library requesting a book. Brown was told the book was not in but would be sent. It was in fact eventually sent to a "Blue" bookmobile, one specifically reserved for use by blacks. When he was told the book was not available, Brown and those with him staged a peaceful sit-in at the library. They were arrested within ten to fifteen minutes of beginning the sit-in and convicted of breach of the peace. The United States Supreme Court reversed the convictions. Justice Fortas, joined by Justices Warren and Douglas, wrote for the Court in the vein of a broad reading of first amendment protection.

> We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. The Constitution of the State of Louisiana reiterates these guaranties. See Art. I §§ 3, 5. As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities. . . . Accordingly, even if accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case.[169]

Justice White concurred in the result but reasoned that it was normal to remain in a library for ten minutes and thus petitioners' activities were an authorized use of the library. Justice Brennan also concurred in the result but declined to decide whether the actual conduct was protected, maintaining that it was sufficient to decide that the conduct was arguably constitutionally protected and not "hard-core" conduct obviously prohibited under any construction of the breach of peace statute.[170] Justice Brennan concluded that the breach of peace statute was overly broad and that the convictions therefore had to be reversed.[171] Clearly, the Court did not have a unified position with regard to the protection of actions within the scope of the first amendment.[172]

The extent to which one wants to include action within the protected sphere of the first amendment seems to relate to (1) what theory of the first amendment one espouses, (2) whether the first amendment is thought to be "absolute," and (3) what beliefs or opinions are the subject of the speech. It has already been shown, for example, that a court that will protect a broad spectrum of actions of advocacy by the NAACP will not protect a very restricted realm of speech or non-speech in the context of investigation of

169. *Id.* at 141-42 (citations omitted).

170. *Id.* at 147-48 (Brennan, J., concurring).

171. *Id.* at 145.

172. *See* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1966); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

subversive organizations.[173] Refusal to reveal one's associations was not protected when the associations were "subversive."[174] Though Justice Douglas frequently characterized first amendment protection as an "absolute" right, the majority of the Court's opinions seem instead to rely on the view that it is proper to balance the state's interest in the information against the importance of the freedom of association.[175]

Although there is dispute whether a theory of the first amendment is feasible, two distinct postures demonstrate the relation between theory and the scope of first amendment protection. Emerson's widely recognized theory is that the function of freedom of expression in a democratic society is found in the values of that society. Specifically the values that Emerson notes are that

> [m]aintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.[176]

This view leads Emerson to discuss the first amendment in terms of freedom of expression and to distinguish "expression" that is protected from "action" that may not be. It is his view that "the starting point for any legal doctrine must be to fix this line of demarcation."[177] The distinction for Emerson between expression and action is a "question of whether the harm attributable to the conduct is immediate and instantaneous, and whether it is irremediable except by punishing and thereby preventing the conduct."[178] As a basic implication of his theory, Emerson identifies the principle that "it is not a general measure of the individual's right to freedom of expression that any particular exercise of that right may be thought to promote or retard other goals of the society."[179] It is a further implication of his view that the theory "rests upon a fundamental distinction between belief, opinion, and communication of ideas on the one hand, and different forms of conduct on the other, . . . [a] distinction . . . between 'expression' and 'action.' "[180] From the theoretical position of Emerson, therefore, the first amendment protects

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173. *Cf.* NAACP v. Button, 371 U.S. 415 (1963) (protecting solicitation of legal cases); Barenblatt v. United States, 360 U.S. 109 (1959) (refusing to reverse a contempt of Congress citation for an individual who refused to answer questions by a subcommittee of the House of Committee on Un-American Activities).

174. *E.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961).

175. *E.g.*, Scales v. United States, 367 U.S. 203, 262 (1961) (Douglas, J., dissenting); Times Film Corp. v. City of Chicago, 365 U.S. 43, 78 (1961) (Douglas, J., dissenting).

176. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963).

177. *Id.* at 917.

178. *Id.*

179. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 8 (1970).

180. *Id.*

not only speech per se but all of what we might otherwise call "action" that communicates ideas even if that expression might retard other goals of the society.

In high contrast to Emerson's is the position of BeVier.[181] As a basic postulate, BeVier states that "the [first] amendment protects the process of forming and expressing the will of the majority according to which our representatives must govern."[182] It follows from this postulate that it is perverse to read the amendment as protecting speech that advocates the violent overthrow of the government or violation of duly enacted law.[183] While BeVier grants Emerson the "intuitive appeal" of the value of self-fulfillment,[184] he rejects it as a first amendment principle.[185] Finding no "principled distinction" between expression and action,[186] BeVier accuses Emerson of begging the question on the judgment in important cases regarding what constitutes self-fulfilling expression and what is action[187]—that is, what human activity can be regulated by the state and what cannot.

The argument has not been settled among commentators on the distinction between expression and action, and the course of the many first amendment decisions by the Supreme Court evidences a continuing fluidity in the importance of the distinction. The principle of law did develop, however, that an overly broad federal, state, or municipal statute was likely to be unconstitutional even though it regulated action or conduct, since it could be applied in such a way as to suppress freedom of association.[188] The balance of state interest against individual first amendment rights was struck against an unlimited variety of conduct in a draft card burning case.[189] The Court even came to hold the view that a distinction had to be made between speech that advocated violence and "advocacy . . . directed to inciting or producing imminent lawless action . . . likely to incite or produce such action."[190] Advocating violence is therefore within the scope of first amendment protection. A

181. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

182. *Id.* at 309.

183. *Id.*

184. *Id.* at 318.

185. *Id.*.

186. *Id.* at 320.

187. *Id.*

188. Cox v. Louisiana, 379 U.S. 536 (1965). This general principle was stated by Justice Black, writing for the Court:

> A state statute . . . regulating conduct—patrolling and marching—as distinguished from *speech*, would in my judgment be constitutional, subject only to the condition that if such a law had the effect of indirectly impinging on freedom of speech, press, or religion, it would be unconstitutional if under the circumstances it appeared that the State's interest in suppressing the conduct was not sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment freedoms.

Id. at 577.

189. United States v. O'Brien, 391 U.S. 367, 376 (1968).

190. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

distinction has been drawn by the Court between being a member of an organization and having the specific intent to do an illegal act. Thus, in *Elfrandt v. Russell*,[191] the Court struck down as overbroad a statute requiring an oath that would be falsely sworn if taken by one who belonged to a "subversive" organization. The Douglas opinion, again relying on *NAACP v. Alabama*, stated that "[a] law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."[192] Other "subversive activities" statutes and investigations have been held unconstitutional for overbreadth.[193] In the development of each of these propositions of protection of first amendment rights and freedom of association, *NAACP v. Alabama* and its progeny have played a role.

Once the Court worked its way out of the grim era of the witch-hunts for subversives, the principles of *NAACP* can be seen to flower in a number of areas. In the area of labor organization the Court has found protection of picketing, even by consumers at a secondary distribution point.[194] Labor unions have been acknowledged to have standing to sue on behalf of the union members.[195] Forced participation in a union, however, violates freedom of association.[196] Standing as discussed in *NAACP* has been both broadly[197] and narrowly construed.[198] The narrow construction represented a return to the *NAACP* requirement of a showing or at least an allegation of injury to the organization itself.[199] The Court continued the protection of litigation as a form of advocacy in a case of an attorney informing women of their rights after they were sterilized as a condition of receiving public assistance.[200] The civil rights objectives of the organization were within the protection of the association for advancement of beliefs and ideas announced in *Button*.[201]

In one year the Court decided two cases concerning revelation of one's "subversive" associations as a prerequisite to admission to the bar. One case, *Baird v. State Bar of Arizona*,[202] held that it was a violation of first amendment rights to condition admission to the bar on the answer to the

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191. 384 U.S. 11 (1966).

192. *Id.* at 19.

193. *E.g.*, United States v. Robel, 389 U.S. 258 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

194. NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58 (1964). In Justice Black's concurrence, the first amendment protection was said to extend to nonprotected conduct when it was intertwined with constitutionally protected conduct. *Id.* at 77-78.

195. National Motor Freight Traffic Ass'n v. United States, 372 U.S. 246 (1963).

196. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

197. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

198. *E.g.*, Warth v. Seldin, 422 U.S. 490 (1975).

199. *Id.* at 511.

200. *In re* Primus, 436 U.S. 412 (1978).

201. *Id.* at 427-29.

202. 401 U.S. 1 (1971).

question inquiring into one's political memberships. Almost inexplicably, in *Law Students Research Council v. Wadmond*,[203] the Court found that it was not a violation of one's first amendment rights to be required by the New York Bar to produce affidavits proving that one was "loyal" to the government. The Court showed similar schizophrenia with regard to election law, holding unconstitutional Ohio's ballot restrictions against minority parties[204] but finding acceptable a New York statute requiring a voter to enroll in the party of his choice some thirty days before the general election in order to vote in the next party primary.[205] The latter is all the more inexplicable in that the Court struck down statutes denying welfare benefits unless recipients met a length of residence requirement.[206]

Three fairly recent cases suggest that the Court is returning to the requirement of a showing of harm before the freedom of association of the *NAACP* decision will be recognized. In *Buckley v. Valeo*[207] the Court found an absence of the requisite showing of harm before nondisclosure was permitted under the Federal Election Campaign Act of 1971. The next year, the Court refused to extend freedom of association principles to the physicians in New York who were required to disclose to the State Health Department which patients received certain classified drugs.[208] Finally, in what must be considered a most aberrational use of *NAACP*, the Court held in *Runyon v. McCrary*[209] that parents of white children had a first amendment freedom of association that protected their sending their children to a school that taught the necessity of racial segregation. That right, however, did not extend to the school's exclusion of black children. The white parents had not shown that the admission of black children would inhibit the teaching of the belief and dogma protected by their first amendment rights.

VI. CONCLUSION

The *NAACP* decision, viewed in isolation from the subsequent opinions that rely upon it, seems to suggest that the concept of privacy is logically entailed by freedom of speech and the penumbral right of freedom of association. The Court's terminology—the right of freedom of association is characteristically self-nullified at the very moment of assertion—implied more than could be justified. The privilege not to disclose one's associations is a function of practical considerations such as harassment, loss of employment and so on—the sort of effects that would chill the full exploration of one's beliefs and would intimidate the

203. 401 U.S. 154 (1971).
204. Williams v. Rhodes, 393 U.S. 23 (1968).
205. Rosario v. Rockefeller, 410 U.S. 752 (1973).
206. Shapiro v. Thompson, 394 U.S. 618 (1969).
207. 424 U.S. 1, 69, 241 n.4 (1975).
208. Whalen v. Roe, 429 U.S. 589 (1977).
209. 427 U.S. 160 (1976).

advocate. Because of the need to protect the individual's first amendment right, the Court found standing for the organization to assert that constitutional right on behalf of its members.

During the period after the *NAACP* decision, the Court was faced with two competing demands. The Court wanted to protect the emerging civil rights movement, and it thus repeatedly found the precedent of *NAACP* determinative of the protection of the activities of the persons involved in that movement. The Court stretched its conception of freedom of association so that it could embrace and protect the promotion of litigation, peaceful demonstrations and sit-ins. A very strong pull in the opposite direction was the national alarm at the infiltration of communists into the very fabric of Amrican life. In response, employers required loyalty oaths and investigatory bodies charged and convicted the suspected subversive on contempt for refusal to reveal membership in organizations. Known communists were denied employment and denied passports. Thus, while membership in some organizations was protected, membership in others was not. The Court struggled to find some consistent rationale for the considerable number of cases decided in the 1960s on freedom of association. Although the Court never seemed to find that rationale, the political climate changed. The civil rights movement came to be more acceptable to mainstream America and the witch-hunt cooled. No longer was it generally believed that subversives lurked behind every "front" organization.

That the rationale of the *NAACP* cases has never been coherently worked out is currently a benign fact of the history of the Court. Those who wish to protect worthy causes can take comfort in *NAACP* and the many, many cases that followed it. Nevertheless, the lack of theoretical neatness in the area of first amendment protection is disturbing. Nothing suggests that the fear and turmoil of the 1960s and the Vietnam era cannot return. Hence, precisely when the marketplace of ideas will again most need the guidance of clear heads, no one will know which organizations will be considered "worthy."

Marsha Rockey Schermer